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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DENNIS MALCOLM ALLISON, Defendant and Appellant.	H039697 (Santa Clara County Super. Ct. No. C1236091)

Defendant was sentenced to a four-year prison term following jury convictions for felony indecent exposure and failure to register as a sex offender. On appeal, he claims evidentiary, instructional, and sentencing error. He challenges the denial of his motion to bifurcate trial on a prison prior allegation, prosecutorial misconduct, and ineffective assistance of counsel. Finding no error, we will affirm.

I. BACKGROUND

A. PRETRIAL PROCEEDINGS

Defendant was arrested and charged with indecent exposure 26 days after serving four-and-one-half months in jail for failing to register as a sex offender. The court granted his motion for self-representation after his initial arraignment, he represented himself at the preliminary hearing, and he was held to answer on charges of indecent exposure with a prior indecent exposure conviction (Pen. Code, § 314.1[1]; count 1) and

[1] A second or subsequent conviction for indecent exposure under Penal Code section 314, subdivision 1 is deemed a felony. (Pen. Code, § 314.)

failure to register as a sex offender (Pen. Code, § 290.015, subd. (a); count 2). The information alleged a prior prison term for a 2000 felony indecent exposure conviction in Santa Clara County Superior Court case No. CC074550. (Pen. Code, § 667.5, subd. (b).)[2] The prior indecent exposure conviction was the same case No. CC074550 conviction alleged in count 1 to establish a second or subsequent violation, and in count 2 as the basis for the registration requirement.

Defendant requested and was appointed counsel at a later pretrial hearing. At the master trial calendar setting, the court heard and denied a request for new counsel. When trial started three days later, defendant was transported from the jail to the holding cell adjacent to the courtroom, but he refused to enter the courtroom. The judge activated speakers in the holding cell to allow defendant to hear what was being said in the courtroom, and defendant reacted by repeatedly flushing the holding cell toilet and covering his ears. Defendant's attorney conveyed to defendant the court's request that he enter the courtroom to explain his concerns. Defendant refused. After finding that defendant was aware of the trial schedule, his right to be present at the trial, and that he was making a voluntary choice not to be present in the courtroom (§ 1043, subd. (e)(4)), the court heard pretrial motions.

During a recess, the court was informed that defendant wished to be moved to the general holding cells downstairs. After again asking defendant to enter the courtroom, the court found that defendant was making a voluntary choice not to participate in the trial and allowed defendant to be taken downstairs. Despite the court's repeated invitations and inquiries throughout the trial, defendant refused to participate in his trial.

[2] Undesignated statutory references are to the Penal Code.

B. THE PROSECUTION'S CASE

1. Count 1—Indecent Exposure

Ms. L. testified that while studying at the Saratoga Library on June 30, 2012, she noticed defendant, who was wearing very short running shorts, seated on the floor by a bookcase reading and glancing at her. After a while, defendant moved to a nearby table and continued to glance at her. A few minutes later, he moved to the table across from hers, so he was positioned "right in front of me," and she noticed he was reading a National Geographic book. He moved his chair so that his right side was facing her, draped his right leg around the end of the chair, and pulled his penis out of his shorts. He made eye contact with her, and it appeared to her that he was waiting for a reaction. Her view was unobstructed. Feeling uncomfortable and offended, she gathered her belongings to leave. She asked defendant whether he did this at every library, and she told him she could call the police. He mumbled something she did not hear, and he watched her leave. She reported defendant to the librarian because she did not want him to do the same thing to children.

A few weeks before the Saratoga Library incident, a different man exposed himself to Ms. L. outside the Campbell Library.

On cross-examination, Ms. L. testified that she did not notice a penis when defendant initially sat down, that she observed a motion—lower body movement—before seeing defendant's penis, that "it just didn't fall out like that," and that "in order for the penis to lie on the chair like that you have to pull it out. It doesn't fall like that." She clarified that defendant exposed his flaccid penis and genitals through the leg of his shorts, and "when I saw the penis I looked at his face and he was looking at me." She did not have a clear purpose in speaking to defendant; she was in shock that "it happened again to me," and she was trying to figure it out in her mind.

On redirect examination, Ms. L. testified that she had not seen defendant's penis before he shifted his chair while seated at the table across from hers. She could not

remember how long he exposed himself to her, but after reviewing her preliminary hearing testimony, she testified that he exposed himself for 40 to 60 seconds while she collected her things. On further recross-examination, Ms. L. explained that it was not possible defendant was exposed before sitting at the table next to hers "[b]ecause when he sat -- when he moved the chair sideways, he sat down, I did not see a penis, and then when I saw the motion I looked up and there was a penis."

2. Count 2—Failure to Register

A Santa Clara County sheriff's deputy testified that defendant was required to register as a sex offender as a result of a 2000 felony conviction for violating section 314.1. Defendant had signed a form notifying him of the registration requirement, he was required to register within five days after being released from jail, and he failed to do so. He was required to register in Santa Clara County because he was paroled to San Jose. The deputy testified on cross-examination that there was no obligation to register after being in custody for less than 30 days if returning to an address of prior registration.

3. Prison Prior Allegation

Relying on a report generated by the Santa Clara County Criminal Justice Information Center (CJIC), the sheriff's deputy testified that in 2000 defendant had been sentenced to state prison for three years and eight months in case No. CC074550, he had also sustained criminal convictions in 2008, 2009, 2011, and 2012, and he had served prison terms for the 2009 and 2011 convictions. He was released from custody for the 2012 conviction on June 4.

4. Documentary Evidence

The court admitted certified copies of the information, verdict forms, and abstract of judgment in case No. CC074550. That information charged two counts of indecent exposure occurring in May 2000 in violation of section 314.1, and each count alleged a Santa Cruz County prior conviction for violating section 314.1. The verdict forms

showed guilty verdicts for the 2000 offenses and true findings as to the Santa Cruz County conviction. The documents were admitted to prove the prior conviction (case No. CC074550) alleged in count 1, count 2, and the prison prior allegation. The information and verdict forms also were admitted under Evidence Code section 1108 as evidence of defendant's propensity to commit indecent exposure. The court admitted five pages of chronological history from defendant's prison file, from his intake in 2000 to January 2009, to establish the prior prison term, and a redacted copy of defendant's CJIC criminal history report between 2000 and 2012 to prove the prison prior and to establish knowledge of the registration requirement alleged in count 2. The court admitted a sex offender registration notification form signed by defendant, and documentation showing defendant's June 4 release date to prove count 2.

C. DEFENDANT'S CASE

Defendant presented no evidence in his defense. Defense counsel argued that evidence supporting count 1 was consistent with an inadvertent exposure, and that the failure to register charged in count 2 was not willful because the notification form contained an out-of-county address causing him to reasonably believe that the registration requirement was not applicable to him in this instance.

D. JURY VERDICT AND POST-TRIAL PROCEEDINGS

The jury found defendant guilty of counts 1 and 2, and found true the prison prior allegation. Three days later, defendant moved for self-representation. That motion was granted, and after filing a series of unsuccessful petitions and motions, defendant was sentenced to a four-year prison term.

II. DISCUSSION

A. ASSERTED EVIDENTIARY ERROR

1. Failure to Sanitize Exhibits Proving the 2000 Conviction

Defendant argues that the trial court abused its discretion by admitting evidence of a 1994 Santa Cruz County conviction for indecent exposure "[d]espite explicitly finding

that there was no reason why the jury should see evidence of [his] criminal history prior to 2000[.]" He argues that the court should have sanitized the conviction records in case No. CC074550 of references to the Santa Cruz County prior conviction.

Defendant has forfeited this argument by failing to raise the issue to the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 435; *People v. Hines* (1997) 15 Cal.4th 997, 1041.) Although he objected to using the 2000 conviction documents as propensity evidence supporting the indecent exposure count, he did not object to admission of the documents to prove the 2000 conviction itself.

Alternatively, defendant claims that trial counsel was ineffective for failing to seek redaction of references to the Santa Cruz County conviction. Ineffective assistance of counsel requires a showing that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' [citation], the case is affirmed [citation]." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) Prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694.) A reasonable probability is "a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

We reject defendant's argument that counsel's performance was deficient. Defendant grounds his argument in the trial court's ruling excluding "information about criminal history" before 2000, but that ruling was not a finding that defendant's criminal history before 2000 should not come before the jury. Rather, it was a narrow ruling

directed at defendant's CJIC criminal history report. That report was admitted both to prove the prison prior allegation by showing that defendant had not remained free of felony convictions after 2000, and to show knowledge of the sex offender registration requirement in count 2. The limited ruling was express: "[W]ith respect to [the CJIC report], all criminal history information that is contained on that document related to incidents prior to docket CC074550 will be redacted." Accordingly, the court redacted the CJIC report—which showed only defendant's criminal history in Santa Clara County, not out-of-county convictions—to show history relevant to the prison prior allegation and sex offender registration.

Counsel did not otherwise render deficient performance by failing to seek redaction of the 2000 conviction documents because he may have been of the reasonable view that such a request would have been unsuccessful. To prove the prison prior allegation, the prosecution had to establish that defendant had been convicted of felony indecent exposure, a second or subsequent violation of section 314.1. (§ 314.) Thus, the prosecution needed to show that defendant had been convicted of indecent exposure in 2000 *with a prior conviction*. Sanitizing case No. CC074550 conviction documents in the way defendant now argues would have impaired the prosecution's ability to prove the allegation.

Defendant has also failed to show prejudice. As to count 1, the testimony of Ms. L., fully developed through cross-examination, does not support defendant's theory that he exposed himself by accident. Ms. L. testified that she was certain the exposure was intentional and directed at her, and that she was not mistaken or confused because of the incident at the Campbell Library. As to count 2, the evidence was uncontested. On this record, we find no reasonable probability that the results of the proceeding would have been different had the jury been unaware of the Santa Cruz County conviction.

2. Failure to Exclude or Sanitize Defendant's Prison Chronology

Defendant argues that the trial court abused its discretion by admitting the chronological history from his prison file because it was inflammatory, confusing, and cumulative of other evidence. The chronology was offered by the prosecution to prove the prison prior allegation by establishing that defendant had not remained out of prison custody for five years after he served a prison term for the 2000 felony convictions. (§ 667.5, subd. (b).) The court admitted the chronology over defendant's objection that the cryptic and potentially misleading entries made by unknown declarants were confusing and inflammatory, and that the elements of the prison prior allegation had been established by other evidence. The court observed that defendant's CJIC history identified convictions and sentences but not prison custody, while the chronological history contained the most probative evidence of defendant's prison custody, and that the probative value of the chronology was not outweighed by a substantial danger of prejudice or confusion.

We find no abuse of discretion. The prosecution relied on defendant's return to prison custody for parole violations to show the absence of a washout period between 2003 and 2008, and the chronology was the only evidence showing defendant's prison custody during that timeframe. The chronology was not unduly prejudicial under the standard articulated in *People v. Heard* (2003) 31 Cal.4th 946, as it did not " 'uniquely tends to evoke an emotional bias against [defendant] as an individual, while having only slight probative value with regard to the issues.' " (*Id.* at p. 976.)

Defendant argues that the trial court could have redacted the chronology to show only the return to custody entries. His failure to ask the trial court for those redactions forfeits that argument on appeal. (*People v. Partida, supra,* 37 Cal.4th at p. 435; *People v. Hines*, *supra,* 15 Cal.4th at p. 1041.) But even on the merits, we would find no abuse of discretion in admitting the unredacted chronology. To prove the prison prior allegation, the prosecution had to show the duration of defendant's prison custody in case

No. CC074550 to establish that prison term (§ 667.5, subd. (g)); and either a new conviction from a felony offense committed within five years after the completion of the prison term in case No. CC074550, or a return to prison custody within five years following that prison term. (§ 667.5, subd. (b); *In re Preston* (2009) 176 Cal.App.4th 1109, 1115–1117.) The jury's attention was directed to three parole revocation/return to custody entries in the chronology, and the remaining entries are not readily decipherable. Indeed, defendant admits that the chronology "consisted almost entirely of shorthand, abbreviations, and acronyms that have no common usage outside the corrections system," and the entries would be "exceptionally confusing to anyone without experience working at CDCR[.]" There is no reason to believe the jury would have speculated about those entries, much less rejected full and fair consideration of Ms. L.'s testimony in light of the chronology, as defendant argues. Finding no evidentiary error, we necessarily reject defendant's contention that he was deprived of a fair trial and due process under the federal Constitution.

B. ASSERTED PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor committed prejudicial misconduct during closing argument by misstating facts, arguing facts not in evidence, and commenting on defendant's absence from the courtroom. A prosecutor commits misconduct by using " 'deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " (*People v. Lopez* (2013) 56 Cal.4th 1028, 1072.) In closing argument, "[p]rosecuting attorneys are allowed a 'wide range of descriptive comment' and ' " 'their argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' " (*People v. Martinez* (2010) 47 Cal.4th 911, 957.)

Misconduct under state law is reviewed for a reasonable probability of a more favorable outcome to defendant but for the misconduct. (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) "[W]hen the claim focuses upon comments made by the prosecutor

before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Misconduct by a prosecutor that does not result in the denial of a defendant's specific constitutional rights is reversible error under the federal Constitution only when the challenged action " ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' " (*People v. Riggs, supra*, at p. 298.)

1. Argument Regarding Prior Offenses

The prosecution moved in limine to introduce the information and verdict forms establishing defendant's 2000 convictions for indecent exposure with a prior as propensity evidence under Evidence Code section 1108. The prosecution's motion requested use of the "certified court records to prove that the defendant previously committed indecent exposure with a prior in 2000" as propensity evidence, "[s]pecifically, … the Information, the Verdict forms, and Felony minutes" from case No. CC074550. The motion continued, "The passage of time between the uncharged offenses and the charged offenses in this case do not require that this evidence be excluded. The defendant was convicted for the felony in 2000 where he eventually went to prison. He was convicted of the same misdemeanor in 1994. Now, in 2012, here we are again. This is what defendant does. This is who he is."

Arguing the motion, the prosecutor noted that the conviction documents were from 2000, but "[defendant] has been doing this from 1994," and the 1994 prior was found true by a jury in 2000. When asked whether she was seeking only to introduce evidence of the events from 2000, the prosecutor explained, "from the 2000 case under 1108 just a felony conviction with a prior and bring in [] the documents, under 452.5[,] subsection (b)."[3] The court continued, "I want to make sure I understand. So you talk

[3] Evidence Code section 452.5, subdivision (b)(1) allows use of a certified official record of conviction to prove the commission of the offense.

about two events, one in 1994 and one in 2000?" The prosecutor answered, "I mentioned both events, but the only one that I'm going to bring in with the certified priors is, the certified priors that I have is the 2000, and I have attached those documents to my motion."

The court granted the motion, stating "I have looked at [the exhibit] … . [¶] Based on everything that is before the Court, the People's request to introduce evidence of the certified documents regarding the defendant's conviction for two violations of Penal Code Section 314.1 describing acts that were alleged to have occurred on or about May 13, 2000 is granted."

Defendant derives from this colloquy that the prosecutor assured the court "that she was specifically asking to admit the 2000 case from Santa Clara County, and not [the] 1994 [Santa Cruz County] conviction," as propensity evidence. He also interprets the court's ruling to admit defendant's CJIC history starting in 2000 as directing that the jury not see evidence of priors before 2000. Defendant then argues that the prosecutor committed misconduct by improperly urging the jury to rely on propensity evidence, and inflaming the passions and prejudices of the jury during closing argument by repeatedly referring to four times that defendant had been caught exposing himself.

"As a general rule, ' "[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." ' " (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) Although defendant objected to the prosecutor's argument, the basis for the objection was "improper argument, facts not in evidence," not misconduct, and defendant did not request an admonition. Thus, he has forfeited this claim.

Even if not forfeited, the claim would be meritless. In arguing to the jury that defendant had the specific intent to offend Ms. L., the prosecutor read one of the 2000 verdicts, including the true finding that defendant had been convicted of a prior violation

of section 314.1 in Santa Cruz County; pressed that there were two counts; and continued: "So that's the prior 1, 2, 3, and here we are again, four times, four times." At that time, defendant objected "as to two different incidents and improper argument, facts not in evidence." After a sidebar conference, the court overruled defendant's objection, and the prosecutor resumed her argument: "As I stated four different times, this is the fourth time we've been here."

The trial court's ruling on defendant's objection during the prosecutor's argument directly dispels that the prosecutor violated the court's evidentiary rulings or otherwise committed misconduct. Although the court's propensity evidence ruling was not entirely clear, it did admit the 2000 conviction documents under Evidence Code section 1108, and those documents showed convictions for indecent exposure with a prior conviction. Any confusion or misunderstanding regarding the scope of that ruling was eliminated when the court overruled defendant's objection to the prosecutor's argument, allowing her to rely on three prior convictions as evidence of defendant's specific intent to commit count 1.

We also reject defendant's argument that the prosecutor misled the jury into believing that the 2000 case involved two separate incidents. Defendant cites the information in case No. CC074550 as establishing that the two counts "arose from the same act involving two victims." No facts in the information support defendant's argument. In light of the appellate disposition of that case,[4] we deem the argument frivolous.

[4] In disposing of defendant's appeal in case No. CC074550, this court concluded: "The time interval between each exposure and [defendant's] conscious choice to cover himself each time the children rode off makes each time he opened his legs in front of the children a separate and distinct violation of Penal Code section 314." (*People v. Allison* (Mar. 25, 2003, case No. H022290) [nonpub. opn.].)

2. Examination and Argument Regarding the National Geographic Book

Defendant argues that the prosecutor committed misconduct by using "insinuation and deception" to persuade the jury that a National Geographic book he was reading at the Saratoga Library "was full of images of naked people," and that the prosecutor's direct examination of Ms. L. and closing argument were "part of a calculated strategy to misstate or misconstrue the facts in order to persuade the jury that [defendant] was a pervert and therefore the charges against him must be true." Defendant has forfeited this argument by failing to object in the trial court. (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) The argument also lacks merit.

The following exchange occurred during Ms. L.'s direct examination: "[Prosecutor] And what book was that? [¶] [Ms. L.] It just seemed like a National Geographic book. [¶] [Prosecutor] The type of book that has naked women in it?" After an objection was sustained for lack of foundation and the prosecutor established that Ms. L. had seen the images in the book after the sheriffs deputies arrived, the colloquy continued: "[Prosecutor] What were the images in the book? [¶] [Ms. L.] Just kind of African tribe photos. [¶] [Prosecutor] And when you say African tribe photos, were the women clothed or unclothed? [¶] [Ms. L.] They were, I think I noticed mostly the male images, like they were partially clothed. I don't remember what other images. [¶] [Prosecutor] Were there women in there as well? [¶] [Ms. L.] I don't remember. [¶] [Prosecutor] Okay, so there were some partially clothed people in the book? [¶] [Ms. L.] Yes." The court overruled defendant's objection that the prosecutor's question misstated the witness's testimony.

In closing, the prosecutor argued, "And don't forget what [defendant] was reading, a tribal magazine with pictures of naked people or half naked people[.]" When rebutting defendant's inadvertence argument, the prosecutor retorted, "Now counsel is saying that [defendant] inadvertently took out his penis, oops, there it is, and our victim may have

been mistaken and she focused on other things, and he didn't do [it] for any sexual gratification, really? Just because his penis is flaccid, really? He's looking at a book with half naked people in it. He's going to the library looking at a book with half naked people continuously making eye contact with the victim. Moving closer to the victim. And once his penis and balls are out and his legs are opened staring at the victim he continually stares at her for 40 seconds to a minute to get her reaction. Why? Why? For his sexual gratification[.]" Persisting that the exposure was for sexual gratification, the prosecutor continued: "Why would somebody do that? Why would somebody do that looking at that type of book? Ask yourselves, why would a reasonable person do that? Other than for the sexual gratification there's no other reasonable explanation, none whatsoever."

Defendant analogizes the prosecutor's argument to misconduct committed during cross-examination of the defendant charged with selling marijuana in *People v. Wagner* (1975) 13 Cal.3d 612 (*Wagner*). The prosecutor in *Wagner* asked questions such as " 'Isn't it true that you in fact sold heroin?' " and " '[B]ut you are also in the business … of furnishing cocaine a drug, for sale, illegally, isn't that correct?' " and " 'Isn't it true that … you had in your possession approximately three kilograms of pure pharmacy cocaine?' " (*Id*. at p. 616.) The *Wagner* court concluded that the prosecutor had committed misconduct by impeaching the defendant with specific acts of misconduct—a form of impeachment which was prohibited under the rules of evidence at that time. (*Id*. at p. 618; see *People v. Harris* (1989) 47 Cal.3d 1047, 1080–1082 [Evidence Code sections 786–790 repealed in 1982 by Proposition 8].)

The *Wagner* court observed that "[b]y their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question," yet the prosecutor had made no offer of proof to establish a good faith basis for asking the questions. (*Wagner*, *supra*, 13 Cal.3d at pp. 617, 619.) Despite Wagner's negative responses to the questions, "the jurors were

led to believe that, in fact, [he] had engaged in extensive prior drug transactions." (*Id*. at pp. 619–620.) The court found the misconduct prejudicial because the defendant's guilt rested on the jury's determination of the relative credibility of the witnesses, and "[t]he highly prejudicial implications [of the] cross-examination could serve only to reduce and impair his credibility and to present him to the jury as a person of criminal tendencies." (*Id*. at p. 621.)

The instant case is markedly distinguishable from *Wagner*. Here, defendant did not testify, and the claimed misconduct did not involve impeachment. The court overruled defendant's objection to the prosecutor's question in which she referred to photos of "partially clothed people." Although Ms. L. did not recall seeing specific pictures of women in the book, the prosecutor did not misstate the evidence in her closing argument, and it was not improper for her to argue that defendant was seeking sexual gratification from the book.

3. Comment on Defendant's Absence From the Courtroom

The court instructed the jury regarding defendant's absence from the courtroom: "The fact that a defendant is or is not in the courtroom during portions of the trial is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations." The prosecutor began her closing argument by observing: "Mr. Allison, he's the one who is responsible for the verdict in this case. Just remember this is Mr. Allison here (indicating). He may not have been with us today or during this trial, but this is who we are here for, Mr. Allison. And this is the person, Mr. Allison, who is responsible for the verdict. This is why we're here."

Defendant argues that trial counsel was ineffective for failing to object to the prosecutor's comment, which he contends constituted misconduct by defying the court's instruction and encouraging the jury to draw an adverse inference from defendant's absence. We reject that claim.

In our view, counsel did not render deficient performance because he may have viewed the prosecutor's comment as inconsequential and may not have wanted to draw attention to defendant's absence himself by objecting. The prosecutor's comment was not directed at defendant's failure to testify (see *Griffin v. California* (1965) 380 U.S. 609, 614), nor was the prosecutor inviting the jurors to draw any adverse inference from defendant's absence. Rather, the comment could reasonably be viewed as a reminder that this case was about a person, not an empty chair, and that the person—defendant—should be held accountable for his actions. (Cf. *People v. Sully* (1991) 53 Cal.3d 1195, 1241 [The inevitable prospect of prejudice does not result from a defendant's absence from trial.].)

Defendant also fails to show prejudice. Given the uncontradicted testimony of Ms. L. and the uncontroverted documentary evidence supporting defendant's guilt in this case, it is not reasonably probable that an outcome more favorable to defendant would have resulted without the reference to defendant's absence.

4. Asserted Cumulative Misconduct

Finding no prosecutorial misconduct, we necessarily reject defendant's argument that cumulative misconduct violated his rights under Sixth and Fourteenth Amendments to the federal Constitution and the California Constitution.

C. ASSERTED ERROR REGARDING BIFURCATION

Defendant argues that the denial of his motion to bifurcate trial on the prison prior allegation deprived him of a fair trial on counts 1 and 2 because the evidence establishing the prison prior was prejudicial and not relevant to the charged offenses. He argues that the sentence (44 months) and parole violations corresponding to the 2000 convictions, although relevant to establishing the absence of a five-year washout period, were inadmissible to prove counts 1 and 2 and unduly prejudicial. He contends that the parole violations were inflammatory, as they were likely to persuade the jury that he was

incorrigible, had a propensity to violate the law, and deserved imprisonment regardless of the charges.

We review the trial court's denial of defendant's motion to bifurcate trial on the prior prison allegation for abuse of discretion. (*People v. Calderon* (1994) 9 Cal.4th 69, 79.) "[T]he denial of a defendant's timely request to bifurcate the determination of the truth of a prior conviction allegation from the determination of the defendant's guilt is an abuse of discretion where admitting, for purposes of sentence enhancement, evidence of an alleged prior conviction during the trial of the currently charged offense would pose a substantial risk of undue prejudice to the defendant." (*Id*. at pp. 77–78.)

The court denied defendant's motion to sever counts 1 and 2, noting that the offenses were of the same class of crimes and that the prior conviction forming the basis for the registration requirement in count 2 was the same 2000 conviction alleged in count 1 to establish a second or subsequent offense of indecent exposure. Likewise, the court denied defendant's motion to bifurcate trial on the prison prior allegation because that allegation required proof of the same 2000 conviction. The court noted that defendant, who at that time was in the holding cell adjacent to the courtroom with the audio system activated, had elected not to participate in his trial, and had indicated no desire to admit or waive jury trial on the prison prior allegation. The court considered the possible inflammatory impact on the jury of defendant's prison custody in case No. CC074550, but given the singular type of conduct alleged in the case and the fact that the prior conviction and certified documents would be admissible for other purposes, it concluded that a unitary trial would not deny the defendant any statutory or constitutional rights.

The court expressed its continued belief at the conclusion of the prosecution's case that a unitary trial was not unduly prejudicial or a denial of due process based on the totality of the circumstances, including the fact that the prosecution was required to prove all disputed issues beyond a reasonable doubt, as well as the significant and substantial

cross-admissibility of evidence with regard to the counts and the allegation. The court related that a unitary trial was appropriate in the interest of justice, including the efficient and orderly resolution of criminal cases. Further, the strength of the evidence supporting the counts and allegation was not disparate, neither the counts nor the allegation presented extreme or inflammatory facts, and all related to similar conduct.

We find no abuse of discretion in the court's ruling. Three of the four convictions shown on the CJIC report relevant to the prison prior allegation were cross-admissible to prove count 2 (the 2009 and 2011 convictions for violations of section 290.015, subdivision (a) and the 2012 conviction for which defendant was in custody for more than 30 days), and the 2000 conviction documents also were cross-admissible to prove counts 1 and 2. Given the six convictions relevant to counts 1 and 2, we find no undue prejudice in the jury learning of a seventh conviction in 2008 relevant to the prison prior allegation. Nor do we find evidence of the length of the sentence served on the 2000 convictions or the parole violations on that case to be unduly prejudicial. The prison term was not an unusual sentence, and the parole violations had long since been resolved. In our view, there was no substantial risk that the jury would forego fair consideration of the evidence related to counts 1 and 2, and instead find defendant guilty of those counts based on past parole violations.

D. JURY INSTRUCTIONS

Defendant contends that the trial court committed reversible error by instructing the jury on different burdens of proof—beyond a reasonable doubt and preponderance of the evidence—as they related to the same evidence—the 2000 prior. Although he failed to object to the instructions in the trial court, his claim is not forfeited because he argues that the error affected his substantial rights. (§ 1259; *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.)

We review jury instruction challenges de novo. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We " ' "consider the instructions as a whole ... [and]

assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." ' " (*Ibid*.) "A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant." (*People v. Cross* (2008) 45 Cal.4th 58, 67–68.)

Defendant argues that shifting between the different burdens muddled the standards, so that it was extremely likely the jury became confused and applied an impermissibly low standard of proof to the charges and allegation. He argues that the trial court should have avoided the risk of confusion by omitting reference to the preponderance standard from the propensity instruction, as was done in *People v. Villatoro* (2012) 54 Cal.4th 1152 (*Villatoro*) and *People v. Wilson* (2008) 166 Cal.App.4th 1034 (*Wilson*).

In *Villatoro*, our Supreme Court held that Evidence Code section 1108 permitted a jury to consider a defendant's charged sexual offenses as evidence of propensity to commit other charged offenses, and upheld the jury instruction addressing the propensity evidence. The trial court instructed with a modified version of CALCRIM No. 1191, omitting reference to the preponderance standard applicable to propensity evidence: "If you decide that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged [offenses]." (*Villatoro*, 54 Cal.4th at p. 1167.) The Supreme Court rejected the defendant's argument that the modified instruction failed to designate clearly what standard of proof applied to the charged offenses before the jury could draw a propensity inference from them, thereby allowing the jury to convict under any or no standard and depriving him of the presumption of innocence. It found no risk that the jury would apply an impermissibly low standard of proof because "the instructions clearly told the jury that all offenses must be proven beyond a reasonable doubt, even

those used to draw an inference of propensity," and the trial court had instructed on the presumption of innocence and the reasonable doubt standard. (*Id*. at pp. 1167–1168.)

In *Wilson*, decided before *Villatoro*, this court upheld an instruction similar to that in *Villatoro* allowing the jury to consider evidence of charged sex offenses to show the defendant had the specific intent to commit another charged offense. We reasoned that the instruction (1) omitted reference to a preponderance standard of proof, (2) did not require the jury to make any inference, (3) explained that the inference alone was insufficient to prove guilt, and (4) limited use of the inference to show specific intent to commit a charged offense. (*Wilson*, *supra*, 166 Cal.App.4th at p. 1053.)

Villatoro and *Wilson* upheld modified propensity instructions, but neither case suggested the preponderance burden of proof must be removed from a propensity instruction directed at a prior conviction which is also an element of a charged offense or the basis for an enhancement allegation. We find the instructions accurately conveyed the applicable law and did not diminish the prosecutor's burden of proving the charges or allegation.

After instructing on the presumption of innocence requiring the prosecution to prove its case beyond a reasonable doubt, the court instructed on the elements of each offense, and followed with instructions pertaining to propensity evidence in the form of prior convictions. As to count 1, the court instructed the jury with CALCRIM No. 1191 (evidence of uncharged sex offense)—the instruction defendant claims impermissibly lowered the prosecution's burden of proving the charges and allegation beyond a reasonable doubt: "The People presented evidence that the defendant committed the crime of Indecent Exposure (Penal Code section 314.1) on prior occasions that are not the acts charged as Count 1 in this case. The crime of Indecent Exposure is defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the prior offenses of Indecent Exposure. Proof by a preponderance of the evidence is a different

burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the prior offenses of Indecent Exposure, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit Count 1, as charged here. If you conclude that the defendant committed the uncharged offenses of Indecent Exposure, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Count 1. The People must still prove each charge and allegation beyond a reasonable doubt."

Next, the court instructed on proving the prior conviction alleged in count 1: "If you find the defendant guilty of the crime charged in Count 1, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of another crime. It has already been determined that the defendant is the person named in Exhibits 8, 9, and 10. You must decide whether the evidence proves that the defendant was convicted of the alleged crime. [¶] The People alleged that the defendant has been convicted of one, a violation of Penal Code section 314.1 in the California Superior Court, Santa Clara County CC074550. The People have the burden of proving the alleged conviction beyond a reasonable doubt. If the People have not met this burden, you must find that the alleged conviction has not been proved."

Turning to count 2, the count instructed with CALCRIM No. 1170 (failure to register as a sex offender), which required the prosecution to prove, among other elements, that "[t]he defendant was previously convicted of a felony violation of California Penal Code section 314.1 in the Superior Court of California, Santa Clara County (CC074550)[.]" The court also instructed with CALCRIM No. 375 (Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.), allowing the jury to

consider prior violations of section 290.015, subdivision (a), if proven by a preponderance, to show that defendant's failure to register was willful or purposeful, or that he knew he had the duty to register.

Finally, the court instructed on the prison prior allegation that "[t]he People have the burden of proving this allegation beyond a reasonable doubt," including that defendant was convicted of felony indecent exposure in 2000.

Defendant speculates that the jury was confused by the differing standards, but such speculation is not borne out by the record. The jury was repeatedly instructed that the prosecution was required to prove the charges and allegation beyond a reasonable doubt. Indeed, even the propensity instruction reiterates that point. The prosecutor argued to the jury that she was required to prove the case, including the prison prior allegation, beyond a reasonable doubt. She never mentioned the preponderance standard or suggested that a lower standard of proof applied. Given the presumption that the jury understood and followed the instructions (*People v. Delgado* (1993) 5 Cal.4th 312, 331), the absence of any inquiries to the court during deliberations, and the prompt return of verdicts, we reject defendant's argument that the instructions were unduly confusing. (*People v. Cross, supra*, 45 Cal.4th at pp. 67–68.) On this record, we find no error in the instructions as given.

E. ASSERTED SENTENCING ERROR

Defendant was sentenced to a three-year upper term on count 1, a concurrent three-year upper term on count 2, and a consecutive one-year term for the prison prior enhancement. He argues that the trial court committed error by relying on his 2000 prior to impose both the one-year enhancement and the three-year upper term on count 1. Defendant has forfeited this claimed sentencing error by failing to object in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) We reject defendant's argument that he had no meaningful opportunity to object to the sentencing choice. (*Id*. at p. 356.)

Defendant had access to the probation report, and he made an exhaustive statement to the court at the sentencing hearing.

Defendant's claim also fails on the merits. Although an aggravated sentencing term may not be imposed by using the fact of an enhancement unless punishment for the enhancement is struck (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c)), a single factor in aggravation justifies the imposition of an aggravated term. (*People v. Black* (2007) 41 Cal.4th 799, 816.) An improper dual use of a fact to support the upper term sentence will be upheld unless " 'it is reasonably probable that a result more favorable to [defendant] would be reached in the absence of the error.' " (*People v. Avalos* (1984) 37 Cal.3d 216, 233, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The probation department recommended a three-year aggravated prison term on count 1 based on defendant's criminal record including numerous convictions, unsatisfactory performance on parole, being on parole when he committed the instant offenses, and having served prior prison terms. The probation report showed misdemeanor convictions for disorderly conduct in 1977, 1991, and 1994, resisting a peace officer in 2010, and two counts of indecent exposure in 1994; two felony indecent exposure convictions in 2000; and four felony convictions for failure to register as a sex offender. The report also showed dismissed indecent exposure charges in 1995, 1997, and 1999.

The court pronounced sentence as follows: "I agree with the report of [the] adult probation department that there are many aggravating factors. [¶] The defendant has numerous convictions, the defendant has prison commitments including a prison commitment of 44 months in the state prison for very similar charges. The defendant's performance on parole has been poor. [¶] The defendant admits to multiple acts of absconding. The defendant was on parole at the time these offenses were committed. The defendant has been determined to be in the high risk range of sex offender assessment and the court is mindful of the fact that he did not fully participate in the

interview that was conducted. [¶] But for all of these reasons, the court does believe that the recommendation of the adult probation department to impose the aggravated term for the defendant as to count 1 is appropriate and is in the interest of justice."

The court's pronouncement reflects an aggravated sentence based on several appropriate factors. (Cal. Rules of Court, rule 4.421.) Given the totality of factors, and the absence of mitigating circumstances, it is not reasonably probable that the court would have sentenced defendant to a different term discounting the prison term served for the 2000 convictions.

III. DISPOSITION

The judgment is affirmed.

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Grover, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.

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